Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1978

No. 78-1454

NOVELLA H. TRAGESER,

Petitioner,

v.

LIBBIE REHABILITATION CENTER, INC.,

Respondent.

BRIEF FOR RESPONDENT LIBBIE REHABILITATION CENTER INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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April 16, 1979

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Libbie Rehabilitation Center, Inc., respectfully opposes the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

The opinion of the United States Court of Appeals for the Fourth Circuit in this action has now been reported. It may be found at 590 F. 2d 87 (4th Cir. 1978).

I.

QUESTIONS PRESENTED

1. Do payments under federal health care programs for services rendered constitute federal financial assistance within the meaning of Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794)?

2. Does Section 504 of the Rehabilitation Act of 1973

(29 U.S.C. § 794) confer an individual right of action upon one who contends he was subject to employment discrimination on the basis of a handicap?

3. Do the 1978 amendments to the Rehabilitation Act of 1973 create a new private remedy for one allegedly discriminated against on the basis of a handicap?

II.
STATEMENT OF THE CASE

The petition states (p. 6) that the broad questions whether there is a private right of action pursuant to Section 504 and what federal financial assistance means within the context of the Act are not at issue here. They are not issues only because petitioner has chosen not to designate them as issues. We disagree. We submit that they are threshold issues to the entire matter. If receipt of federal funds for services rendered is not federal financial assistance within the meaning of the Rehabilitation Act of 1973, and if that Act does not create a private right of action in any event, then irrespective of the purpose of the Act this petitioner has no standing in this action.

We accordingly respectfully request this Court to look beyond the questions the petitioner presents and to consider all the questions considered either by the Court of Appeals for the Fourth Circuit or the United States District Court for the Eastern District of Virginia in determining whether the writ should be granted. R. Stern and E. Gressman, SUPREME COURT PRACTICE (5th Ed. 1978), p. 491.

III.
REASONS FOR DENYING THE WRIT

While the trial court and the Court of Appeals differed in their reasoning both concluded that Mrs. Trageser had advanced neither constitutional nor statutory bases for relief.

They rejected her contention that the Rehabilitation Act of 1973 requires a private employer to continue in employment a person who by reason of a handicap unrelated to the employment and arising after the date of employment is unable, in the judgment of the employer, to perform the position for which she was employed.

To impose a requirement on a private employer to continue such a handicapped person in employment clearly represents a radical departure from traditional notions of the employer-employee relationship and of due process of law. As the courts below have found, if Congress had intended such a departure from the existing state of the law it could have expressed itself to that effect in the Rehabilitation Act of 1973 or in the 1978 amendments to the Act. Those amendments, incidentally, were enacted after the decision of the trial court and after oral argument in the Fourth Circuit. Congress did not do so. The courts below correctly concluded they should not imply a remedy where the Congress had not enacted one. The writ should accordingly be denied.

A. Payment For Services Rendered Does Not Constitute Federal Assistance Within The Meaning Of The Rehabilitation Act Of 1973.

Courts have consistently made a distinction between outright grants for federal health care programs and payment for services rendered under other health care programs. For example, some courts have held that receipt of Hill-Burton Act funds constitutes, in effect, federal financial assistance. *Sams* v. *Ohio Valley General Hospital Association,* 413 F. 2d 826 (4th Cir. 1969). But that same court, and many others, have held that receipt of Medicare or Medicaid funds for services rendered by a private physician or private hospital does not convert the medical facility or the physician into an agent of the United States.

Walker v. *Pierce,* 560 F. 2d 609 (4th Cir. 1977); *Ward* v. *St. Anthony's Hospital,* 476 F. 2d 671 (10th Cir. 1973); *Ozlu* v. *Lock Haven Hospital,* 369 F. Supp. 285 (M.D. Pa. 1974). Petitioner cites no case holding that receipt of Medicare or Medicaid funds constitutes a "program or activity receiving Federal financial assistance."

The purpose of the Act is not obscure. It is to prevent handicapped individuals from being denied, solely because of their handicap, the benefits of any program or activity receiving federal financial assistance. It may mean, for example, that a transportation authority receiving federal grants has a responsibility to consider the transportation needs of the handicapped. *Lloyd* v. *Regional Transportation Authority,* 548 F. 2d 1277 (7th Cir. 1977). But, as the courts below have properly concluded, it does not mean that petitioner has a constitutionally or statutorily protected right to continued employment by a private employer who is not operating a "program or activity receiving Federal financial assistance."

B. The Rehabilitation Act Of 1973 Does Not Create A Private Right Of Action Upon Petitioner.

Even if receipt of Medicare or Medicaid payments were to constitute federal financial assistance, which it does not, one searches in vain for any suggestion in the language of Section 504 of the Rehabilitation Act of 1973 that it creates a private right of action for discrimination in employment because of a handicap:

> "No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

Since there is no explicit private right of action for discrimination in employment on the basis of a handicap petitioner urges this court, as she did the trial court and the Fourth Circuit, to imply such a right of action. *Cort* v. *Ash,* 422 U.S. 66, 78 (1975), sets out several tests to be considered in determining whether a private right of action should be implied where Congress has not specifically granted one:

1. Is the plaintiff one of the class for whose special benefit the statute was enacted? The class to be protected here are handicapped persons who seek to participate in, or derive the benefits of, federally assisted programs, not handicapped persons generally. Since there has been no denial of participation in a federally assisted program, the first test is not met.

2. Is there any indication of legislative intent, explicit or implicit, to create or to deny a private remedy? Congress is not inexperienced in remedying what it believes to be employment discrimination. The Age Discrimination in Employment Act, 29 U.S.C. § 621, 626, explicitly provides:

> "Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this Act . . ."

Title VII of the Civil Rights Act of 1964 contains provisions affording similar relief, 42 U.S.C. § 2000e-5(f).

Congress enacted both these statutes prior to the Rehabilitation Act of 1973. It knew how to create a private right. The clear implication is that it intended not to do so in that Act. The second test is not met.

3. Is it consistent with the underlying purposes of the legislative scheme to imply such a remedy?

The legislative history of the 1973 Act is contained in

Senate Report No. 93-318. That Report states, in part, 1973 U.S. Code, Congressional and Administrative News, p. 2032:

SHORT TITLE

> The short title of the bill, the "Rehabilitation Act of 1972," which no longer includes "Vocational," expresses the new thrust of the bill that individuals who apply for services must be given every opportunity to achieve a vocational goal. The bill allows entrance into the program for those whose eventual vocational outcome may not be obvious when they first apply. While the Committee expects and mandates in the Act that the program will remain vocationally oriented, it does believe that there are handicapped individuals whose handicaps are so severe, or because of other circumstances, such as age, that they may never achieve employment. The Committee feels that they should not be denied services.

And again, at p. 2143 of the same report:

SECTION 504

> This section prohibits discrimination, exclusion or denial of benefits to otherwise qualified handicapped individuals by any program or activity receiving Federal financial assistance.

The underlying purpose of the legislative scheme here is to provide for federally funded vocational and rehabilitation assistance and to that end to make certain there is no discrimination against handicapped persons in entry to, and in the benefit of, those programs. Implying a private right of action does not in any way further that purpose. The third test is not met.

4. Is the cause of action one traditionally relegated to state law so that it would be inappropriate to infer a cause of action based solely on federal law? The answer to this question is certainly yes. The private employer—private

employee relationship is relegated to state law with certain limited exceptions such as insuring collective bargaining rights and eliminating discrimination based upon criteria prohibited by the XIV Amendment. All incidents of the employer-employee relationship, except those over which Congress has explicitly legislated, remain with the states.

In short, petitioner's attempt to imply a private right of action here fails each of the tests laid out in *Cort* v. *Ash,* 422 U.S. 66 (1975). Therefore the courts below were correct in refusing to imply a private remedy to plaintiff.

C. The 1978 Amendments To The Act Make It Clear That No Private Remedy Exists Against A Private Employer.

The petitioner argues that from 1973 on Section 504 of the Act outlawed all employment discrimination on the basis of handicap. Accordingly, says the petitioner, the 1978 amendments to the Act, which appear to make it explicit that there is no private remedy, actually should not be given that effect. This argument has no weight at all, unless

1. The 1973 Act outlawed handicap discrimination by private employers;
2. The 1973 Act created a private remedy; and
3. Administrative regulations take precedence over the clear wording of the Act.

None of these is the case, the first two for reasons already discussed. Therefore the construction of the 1978 amendment made by the Fourth Circuit is proper and should be affirmed (Petitioner's Brief; pp. 6A-7A):

> . . . Congress supplemented the Rehabilitation Act by including a § 120(a) of the 1978 amendments a new subsection 505(a)(1) which makes the pertinent remedies, procedures, and rights of Title VII available to federal employees who complain of handicap discrimi-

nation in employment in violation of § 501 of the Rehabilitation Act. Congress also could have utilized Title VII to define the rights and remedies of a person in Trageser's position who must rely on § 504. Instead, for employees of private institutions receiving federal financial aid, § 120(a) of the 1978 amendments makes available only the remedies, procedures, and rights of Title VI, which, as we have noted above, contains the restriction of § 604.

To put it another way, Title VII does give an employee a private right of action against his employer under certain circumstances. The 1978 amendments in their limited incorporation of Title VII give no right of action, public or private, unless the primary objective of the federal assistance is to provide employment. Here there is no showing that federal assistance is involved, much less that the primary objective of Medicare or Medicaid payments is to provide employment.

Unlike petitioner, we do not read the Department of Health, Education and Welfare regulations to reach a contrary result. The regulations themselves are not set out in the petition. They are merely paraphrased in a Senate report cited in the petition at pp. 15-16. That report does no more than reiterate what §§ 601 and 604 of the 1978 amendments provide—that programs receiving federal financial assistance are to be operated without discrimination on the basis of handicap.

At most the HEW regulations say that there may not be discrimination against the handicapped in federally assisted programs even if the purpose of those programs is something else than to provide employment. They suggest neither that Medicare or Medicaid payments constitute federal financial assistance nor that an employee of a private employer has a private remedy.

IV.

CONCLUSION

The trial court and the Court of Appeals gave this case mature consideration. There is no conflict between the wording of the Rehabilitation Act of 1973 and its 1978 amendments and the decision of the Fourth Circuit. The petition should therefore be denied.

Respectfully submitted,

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